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No. _____

Supreme Court, U.S.
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In The
Supreme Court Of The United States

OCTOBER TERM, 1986

RAYMOND M. LOPES, Commissioner of the Connecticut Department of Correction, in his individual capacity,
Petitioner,

v.

ERNEST P. MELE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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LIST OF PARTIES

The parties to the proceedings in the United States Court of Appeals for the Second Circuit were the petitioner, Raymond M. Lopes, Commissioner of the Connecticut Department of Correction, in his individual capacity, and the respondent, Ernest P. Mele.

Raymond M. Lopes, Commissioner of the Connecticut Department of Correction, in his official capacity, William A. O'Neill, in his capacity as Governor of the State of Connecticut, Joseph I. Lieberman, in his capacity as Attorney General of the State of Connecticut, and Victor Liburdi, Warden of the Connecticut Correctional Center — Cheshire, in his official and individual capacity, are also parties to proceedings in this matter in the United States District Court for the District of Connecticut, and represented by counsel for the petitioner. Since issues regarding these parties were not present in the appeal to the Second Circuit, they are not named as parties herein.

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RAYMOND M. LOPES, Commissioner of the Connecticut Department of Correction, in his individual capacity,
Petitioner,

v.

ERNEST P. MELE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner, Raymond M. Lopes, in his individual capacity, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit entered in this case on November 6, 1986.

OPINIONS OF THE COURTS BELOW

The memorandum of decision of the United States District Court for the District of Connecticut has not been officially reported. The District Court's memorandum of decision is printed in the Appendix hereto at pp. 4A-11A.

The judgment and opinion of the United States Court of Appeals for the Second Circuit has not been officially reported. The judgment and opinion of the Second Circuit is printed in the Appendix hereto at pp. 1A-3A.

JURISDICTION

The judgment and the opinion of the United States Court of Appeals for the Second Circuit was made and entered on November 6, 1986 and a copy is printed in the Appendix to this Petition at pp. 1A-3A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves U.S. Const. Amend. XIV, and Conn. Gen. Stat. §§ 5-202, 5-240. Pertinent text of these constitutional and statutory provisions is printed in the Appendix, in accordance with U.S. Supreme Court Rule 21.1(f).

STATEMENT OF THE CASE

This case is a civil rights action initially brought in the United States District Court for the District of Connecticut by respondent Ernest P. Mele,[1] pursuant to 42 U.S.C. § 1983 and the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202. The jurisdiction of the District Court was based upon 28 U.S.C. §§ 1331, 1343.

Respondent Mele's complaint challenged compliance with due process requirements prior to the decisions to impose discipline on a public employee. The respondent had been employed as a Lieutenant in the Connecticut Department of

[1] Although the respondent claims to represent a putative plaintiff class in his Amended Complaint, at the time this Petition is filed no plaintiff class has been certified, nor has any motion for class certification been filed.

Correction. J.A.[2] 6, Amended Complaint, ¶ 15. On April 30, 1984, the respondent was placed on leave without pay pending the outcome of investigation into events alleged to have occurred in April 1984. J.A. 24, 26, Affidavit of Raymond M. Lopes, ¶ 9, Exhibit A. On May 24, 1984, the leave without pay was extended indefinitely. J.A. 24, 27, Affidavit of Raymond M. Lopes, ¶ 10, Exhibit B.

Subsequently, on August 16, 1984, the respondent pleaded guilty, under the "Alford" doctrine to the crime of Sexual Assault in the Fourth Degree, Conn. Gen. Stat. § 53a-73a, and was adjudged guilty. The respondent was provided with a one year suspended sentence and three years probation. J.A. 24-25, 29-30. Affidavit of Raymond M. Lopes, ¶ 11, Exhibit D.

On August 23, 1984, the respondent was dismissed from employment. J.A. 25, 28, Affidavit of Raymond M. Lopes, ¶12, Exhibit C. The respondent took full advantage of the statutory appeal procedure provided in Conn. Gen. Stat. § 5-202. He submitted a grievance to the Commissioner of Administrative Services, which was denied. J.A. 7, Amended Complaint, ¶¶ 21, 22. He took an appeal to the Employees' Review Board. J.A. 8, Amended Complaint, ¶ 25. The Employees' Review Board affirmed his dismissal, after a hearing. J.A. 8, Amended Complaint, ¶¶ 23, 24.

The respondent did not challenge the due process accorded him during the course of this statutory appeal procedure. Rather, he alleged only that he was denied due process in what took place prior to the decisions to discipline him. *E.g.*, J.A. 6, 7, 8, 10, Amended Complaint, ¶¶ 17, 19, 25, 29. In particular, the respondent alleged that prior to his suspension and dismissal, he had no notice of the charges against him and no opportunity to respond. J.A. 7, 8, Amended Complaint, ¶¶ 19, 25. He alleged that Conn. Gen. Stat. § 5-240,

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[2] The abbreviation "J.A." refers to the Joint Appendix filed with the United States Court of Appeals for the Second Circuit.

which authorizes an appointing authority to impose disciplinary measures, is unconstitutional on its face and as applied to him. J.A. 10, Amended Complaint, ¶¶ 29, 30.

The defendants named in the Complaint were the Connecticut Department of Correction,[3] Raymond M. Lopes, Commissioner of Correction, in his official and individual capacity, William A. O'Neill, in his capacity as Governor of the State of Connecticut, Joseph I. Lieberman, in his capacity as Attorney General of the State of Connecticut, and Victor Liburdi, Warden of the Connecticut Correctional Center — Cheshire, in his official and individual capacity. R.[4] 1, Complaint, ¶¶ 4-7; J.A. 4-5, Amended Complaint, ¶¶ 5-8.[5]

On February 4, 1986, petitioner Lopes and the other defendants moved the District Court, pursuant to Fed. R. Civ. P. 12(b)(2), 12(b)(6), to dismiss several claims. J.A. 13, Motion to Dismiss. The motion was granted in part and denied in part. Relevant to this Petition is the denial of the motion to dismiss insofar as it sought dismissal of damages claims against petitioner Lopes, in his individual capacity, based upon the doctrine of qualified immunity. Petitioner Lopes claimed that he was entitled to qualified immunity since the law regarding due process to be provided prior to a decision to take disciplinary action was not clearly established before the decision of *Cleveland Bd. of Ed. v. Loudermill*, ____U.S.____, 105 S.Ct. 1487 (1985). This claim was rejected by the District Court. App.[6] 9A-10A.

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[3] The respondent dropped the Department of Correction as a defendant in an Amended Complaint. J.A. 3.

[4] The abbreviation "R." refers to the Record filed with the United States Court of Appeals for the Second Circuit.

[5] The respondent also alleged that defendants Lopes and Liburdi were representative of a putative defendant class of appointing authorities. As with the claims regarding the putative plaintiff class, as of the date this Petition is filed, no defendant class has been certified, nor has any motion for certification of such a class been filed.

[6] The abbreviation "App." refers to the Appendix to this Petition.

Petitioner Lopes appealed the District Court's decision, on the qualified immunity issue, to the United States Court of Appeals for the Second Circuit. The jurisdiction of the Second Circuit was based upon 28 U.S.C. § 1291. *See Mitchell v. Forsyth*, ____U.S.____, 105 S.Ct. 2806, 2816-2817 (1985). The Second Circuit affirmed the action of the District Court. App. 2A. The Second Circuit concluded that the law was clearly established prior to the decision in *Loudermill*.

REASONS FOR GRANTING THE WRIT

I. THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT HAS RENDERED A DECISION IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS

Certiorari should be granted in this case because the United States Court of Appeals for the Second Circuit has rendered a decision in conflict with the decisions of other Courts of Appeals on the same issue. The Second Circuit affirmed a decision by the District Court refusing to dismiss damages claims against petitioner, in his individual capacity, notwithstanding arguments that qualified immunity shielded him from such claims for damages since the law regarding due process to be accorded prior to a decision to impose discipline on a public employee was not clearly established until *Cleveland Bd. of Ed. v. Loudermill*, ____U.S.____, 105 S.Ct. 1487 (1985).

A review of the decisions in the First, Third, Fourth and Fifth Circuits demonstrates that there is a conflict between the decisions in these circuits and the decision of the Second Circuit in this case. In this case, the Second Circuit addressed an alleged failure before the *Loudermill* decision to provide a due process mechanism prior to a decision to impose discipline, and affirmed the denial of a motion to dismiss damages claims based upon qualified immunity. Thus, a public official may be liable for damages, in his individual capacity, in the Second Circuit under these circumstances, while he would be immune from such liability for damages in other circuits.

On October 29, 1985, and following *Loudermill*, the Fourth Circuit noted that "[t]here was long considerable doubt whether a public employee enjoys a right to some sort of pre-termination hearing." *Buschi v. Kirven*, 775 F.2d 1240, 1255 (4th Cir. 1985).

> It had been generally understood in this Circuit that, where there was an adequate post-hearing remedy available for public employees who were discharged, as there was in Virginia, a pre-termination hearing was not required . . . . *However, on March 19, 1985,* the Supreme Court in *Cleveland Board of Education v. Loudermill*, ____U.S.____, ____, 105 S.Ct. 1487, 1493-94, 84 L.Ed.2d 494, 504 (1985), held that an employee who has a constitutionally protected property interest in his employment . . . is entitled to "some kind of a hearing" prior to discharge.

Buschi, 775 F.2d at 1255 (emphasis added).

The Fourth Circuit held in *Buschi* that summary judgment should have been granted against any claim for recovery of damages. *Buschi*, 775 F.2d at 1256. In so holding, the Fourth Circuit noted that "failure to grant a pre-termination hearing was not at the time in violation of clearly established law. . . ." *Id.*

Likewise, the Third Circuit, in a series of decisions, took the same approach as the Fourth Circuit. As late as June 6, 1984, the Third Circuit, relying on *Arnett v. Kennedy*, 416 U.S. 134 (1974), recognized that there was no entitlement to a hearing prior to a decision to discharge an employee.

> We do not understand Cohen to argue that he is entitled to a pretermination hearing even if he is guaranteed back pay upon reinstatement. Nor would we be persuaded by such an argument. The procedures established by the Philadelphia Home Rule Charter and Civil Service Regulations promulgated thereunder are virtually identical to those approved by the

> Supreme Court in *Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974).

Cohen v. City of Philadelphia, 736 F.2d 81, 84 n.6 (3d Cir. 1984), *cert. denied*, ____U.S.____, 105 S.Ct. 434 (1984).

It was only after *Loudermill* that the Third Circuit determined that some procedure was required prior to a decision to deprive a public employee of a property interest.

> In light of *Cleveland Bd. of Education v. Loudermill*, ____U.S.____, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985) this court, in *Stana v. School District of the City of Pittsburgh*, 775 F.2d 122 (3d Cir. 1985), determined that pre-termination procedures are a requirement of due process where not impracticable.

Brown v. Trench, 787 F.2d 167, 171 (3d Cir. 1986).

The Third Circuit, in *Brown*, noted that its previous *Cohen* decision provided support for the contrary position. "In *Cohen*, this court believed that state-provided post-termination remedies were sufficient to meet the requirements of due process." *Brown*, 787 F.2d at 171.

Similarly, the Fifth Circuit, on May 10, 1985, noted that prior to *Loudermill*, language in some of the decisions of the Supreme Court suggested that state procedures for terminating property rights could limit the substantive property interest. *Levitt v. University of Texas*, 759 F.2d 1224, 1232 (5th Cir. 1985).

Likewise, the First Circuit, on May 16, 1985, recognized that:

> In *Cleveland Board of Education v. Loudermill*, ____U.S.____, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), the United States Supreme Court *recently delineated the scope of pretermination procedures that are due public employees.*

Brasslett v. Cota, 761 F.2d 827, 833 (1st Cir. 1985) (emphasis added).

Moreover, prior to *Loudermill*, at least one Justice of the Supreme Court was of the opinion that state laws could, by the procedures surrounding an employee's job security, define the extent of the employee's property interest in public employment. *Loudermill*, ___U.S. at ___, 105 S.Ct. at 1502-1504 (Rehnquist, J., dissenting).

As argued above, it should be clear that there is a split among the courts of appeals for the various circuits. The Court should grant certiorari to resolve this split in order to resolve the uncertainty that the split has created with respect to the qualified immunity of public officials. Unless the split is resolved, an official's qualified immunity may be applicable in one circuit while his counterpart in another circuit may be found to be personally liable in damages for the same conduct.

II. THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT HAS RENDERED A DECISION IN CONFLICT WITH THE DECISION OF THE SUPREME COURT IN *DAVIS V. SHERER*, 468 U.S. ___, 104 S.CT. 3012 (1984)

The issue of qualified immunity within the context of alleged failure to comply with due process requirements is not new to the Supreme Court. On June 28, 1984, the Court concluded that the law regarding procedures to be employed prior to a decision to discipline a public employee was not "clearly established." *Davis v. Sherer*, ___U.S.___, ___, 104 S.Ct. 3012, 3018-3019. The Court in *Davis* applied the qualified immunity test previously articulated in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

> We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. . . . If the law at that time was not clearly established, an official could not

> reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful.

Harlow, 457 U.S. at 818.

The standard developed in *Harlow* related to legal questions. The Court

> recognized an entitlement not to stand trial or face other burdens of litigation, *conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law.* The entitlement is an *immunity from suit* rather than a mere defense to liability, and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.

Mitchell v. Forsyth, ____U.S.____, ____, 105 S.Ct. 2806, 2816 (1985) (emphasis in original).

Qualified immunity premised upon the legal issue of whether or not the law was clearly established "is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated." *Mitchell*, ____U.S. at ____, 105 S.Ct. at 2817. "[T]he appealable issue is a purely legal one: whether the facts alleged (by the plaintiff, or, in some cases, the defendant) support a claim of violation of clearly established law." *Mitchell*, ____ U.S. at ____, 105 S.Ct. at 2816-2817 n.9.

The *Davis* Court applied these standards in reversing a decision made by lower courts since the law regarding procedures to be employed prior to a decision to discipline a public employee was not "clearly established." *Davis*, ____U.S. at ____, 104 S.Ct. at 3018-3019.[7] Even in addressing the

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[7] In *Davis*, the appellants did not seek review of the questions of whether or not the appellee's constitutional rights were violated. Furthermore, since the District Court lacked jurisdiction due to the doctrine of mootness to consider the constitutionality of Florida law, the Supreme Court only considered the issue of qualified immunity. *Davis*, ____ U.S. at ____, 104 S.Ct. at 3017.

question of what due process required, the *Davis* Court cited *Arnett v. Kennedy,* 416 U.S. 134 (1974), and *Bishop v. Wood,* 426 U.S. 341 (1976), as representing cases "in which the requirements of due process were met . . . ." *Davis,* ____U.S. at ____, 104 S.Ct. at 3019 n.10

The Court expressly considered the lack of clarity in the law in addressing qualified immunity. In this discussion, the Court noted:

> Nor is it always fair, or sound policy, to demand official compliance with statute and regulation on pain of money damages. Such officials as police officers or prison wardens, to say nothing of higher-level executive levels who enjoy only qualified immunity, routinely make close decisions in the exercise of the broad authority that necessarily is delegated to them. These officials are subject to a plethora of rules, "often so voluminous, ambiguous, and contradictory, and in such flux that officials can comply with them only selectively." [citation omitted]

Davis, ____U.S. at ____, 104 S.Ct. at 3021.

The decision in *Davis* recognized that the law regarding procedures prior to a decision to impose discipline was not clearly established. Accordingly, the Florida officials' qualified immunity barred damages. *Davis,* ____U.S. at ____, 104 S.Ct. at 3021. Nor did *Davis* clearly establish what the law was. The issue of what the constitution required was not before the Court. *Davis,* ____U.S. at ____, 104 S.Ct. at 3017.

Moreover, the case of *Arnett v. Kennedy,* the very case that determined that it was constitutionally permissible to discharge public employees without any procedures prior to the decision to impose discipline, so long as there was an adequate post-decisional due process procedure, was cited in *Davis* with approval. *Davis,* ____ U.S. at ____, 104 S.Ct. at 3019 n.10. The decision in *Arnett* was a plurality opinion that noted:

> [W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures

> which are to be employed in determining that right, *a litigant in the position of appellee must take the bitter with the sweet.*

Arnett, 416 U.S. at 154 (emphasis added).

In a concurring opinion, two other justices reached the same result that no predecisional procedure was constitutionally required, for different reasons. The concurrence recognized that

> a requirement of a prior evidentiary hearing would impose additional administrative costs, create delay, and deter warranted discharges. Thus, the Government's interest in being able to act expeditiously to remove an unsatisfactory employee is substantial.

Arnett, 416 U.S. at 168 (Powell, J., concurring).

It was not until *Loudermill* that the Court rejected the "bitter with the sweet" approach to public employee discipline articulated by the Court in *Arnett. Loudermill,* ____U.S. at ____, 105 S.Ct. at 1493.

The *Davis* Court recognized in 1984 that qualified immunity protects public officials, in their individual capacity, from damages claims in these circumstances. *Davis,* ____U.S. at ____, 104 S.Ct. at 3021. Nevertheless, the Second Circuit determined that:

> Lopes, therefore, cannot claim qualified immunity on the grounds that he did not know or have reason to know in 1984 that the Constitution required some process before a permanent government employee could be dismissed.

Opinion of the Second Circuit, App. 2A.

The case of *Logan v. Zimmerman Brush Co.,* 455 U.S. 422 (1982), which the Second Circuit pointed to as the case clearly

establishing what the law was, does not even deal with due process to be accorded in imposing discipline on public employees. Rather, *Logan* focused upon due process to be accorded prior to the extinction of a cause of action. *Logan* addressed what happened to a private sector employee's complaint to the Illinois Fair Employment Practices Commission as a result of the failure of a state official to conduct a timely hearing following the filing of the complaint and prior to expiration of the statutory time limit for action. *Logan*, 455 U.S. at 424–425.

Following *Logan*, the Court in *Davis*, in the context of a case dealing with due process to be accorded to public employees, determined that the law in the area was not clearly established. Thus, not only is the decision of the Second Circuit in this case in conflict with decisions of other circuits, as argued in part one of this Petition, *supra*, but the decision of the Second Circuit is also contrary to the decision of this Court in *Davis v. Sherer*.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that a writ of certiorari should be granted to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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Petitioner,

v.

ERNEST P. MELE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX

JUDGMENT AND OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of November one thousand nine hundred and eighty-six.

Present:

HONORABLE IRVING R. KAUFMAN,
HONORABLE JON O. NEWMAN,
HONORABLE GEORGE C. PRATT,
Circuit Judges,

---------- x

ERNEST P. MELE, Individually and on behalf of others similarly situated,

Plaintiff-Appellee,

—against— 86-7410

CONNECTICUT DEPARTMENT OF CORRECTION, RAYMOND M. LOPES, COMMISSIONER, Individually and Officially, VICTOR LIBURDI, WARDEN, CONNECTICUT CORRECTIONAL CENTER, CHESHIRE,

Defendants,

RAYMOND M. LOPES,

Defendant-Appellant.

---------- x

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was submitted.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

1. Lopes contends that before the Supreme Court's decision in *Cleveland Bd. of Education v. Loudermill*, 105 S. Ct. 1487 (1985), it was not clear that an independent constitutional due process requirement had to be met before the state could deprive an individual of a state created property right, relying on *Arnett v. Kennedy*, 416 U.S. 134 (1974). In that case, however, only three justices concurred in the view that a state property interest is limited by the statutory procedures provided for taking it away. It was not the holding of the case. Certainly by 1982, when the Supreme Court decided *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, any lingering doubts the opinion in *Arnett* may have occasioned were dispelled. The Court squarely held that some form of process is due before the owner of a property interest in employment is finally deprived of it. Lopes, therefore, cannot claim qualified immunity on the grounds that he did not know or have reason to know in 1984 that the Constitution required some process before a permanent government employee could be dismissed.

2. Accordingly, the judgment of the district court is affirmed.

/s/ Irving R. Kaufman
IRVING R. KAUFMAN,

/s/ Jon O. Newman
JON O. NEWMAN,

/s/ George C. Pratt
GEORGE C. PRATT,
Circuit Judges.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

MEMORANDUM OF DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

ERNEST P. MELE, Plaintiff

v. Civil No. H-85-1072 (AHN)

RAYMOND LOPES, Et Al,
Defendants

MEMORANDUM OF DECISION ON DEFENDANTS' MOTION TO DISMISS

The plaintiff is a former employee of the Connecticut Department of Corrections. He brings this action pursuant to 42 U.S.C. Sec. 1983 and 28 U.S.C. Sections 2201 and 2202, seeking monetary damages and injunctive and declaratory relief for alleged violations of his civil rights. He names Department of Corrections Commissioner Raymond M. Lopes, Cheshire Correctional Center Warden Victor Liburdi, Connecticut Governor William O'Neill and Connecticut Attorney General Joseph Lieberman as defendants. The defendants have moved to dismiss portions of this action for want of subject matter jurisdiction and for failure to state a claim upon which relief may be granted. For the reasons set forth below, defendants' motion to dismiss is GRANTED IN PART and DENIED IN PART.

The facts of this case center around the termination of the plaintiff's employment as a lieutenant in the Department of Corrections. The plaintiff was a permanent classified service state employee as defined by Conn. Gen. Stat. Sec. 5-193 et seq.

By letter dated May 1, 1984, he was suspended from his position and placed on leave of absence without pay, effective April 30, 1984, pending administrative investigation. The plaintiff was afforded no hearing prior to this suspension, nor was he given notice of the charges against him. By letter dated August 23, 1984 and signed by Warden Liburdi, the plaintiff was notified that he was dismissed from his position because he had been convicted of a crime. At this time, the plaintiff still had been given no notice of the charges against him and no opportunity to respond to such charges. The plaintiff submitted a grievance to the Commissioner of Administrative Services. After several appeals, the plaintiff's dismissal was upheld by the Employee's Review Board on February 25, 1985.

The defendants have moved to dismiss several claims on the following grounds: (1) All claims seeking damages against all defendants in their official capacities should be dismissed because they are barred by the Eleventh Amendment; (2) All claims against the Governor and Attorney General should be dismissed for failure to state a claim under Fed. R. Civ. P. 12(b)(6); (3) All claims for prospective injunctive relief prohibiting the defendants from suspending or discharging permanent classified government employees in violation of due process should be dismissed as moot; (4) All claims challenging the facial validity of Conn. Gen. Stat. Sec. 5-240 should be dismissed because the plaintiff lacks standing and because the court should abstain from hearing such claims; and, (5) All claims against Commissioner Lopes in his individual capacity should be dismissed for failure to state a claim upon which relief can be granted.

"[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957). Keeping this standard in mind, the court makes the following determinations.

I

A suit for damages may not be maintained against the state itself, or against any agency or department of the state, unless the state has waived its sovereign immunity. *Florida Department of State v. Treasure Salvors,* 458 U.S. 670, 684 (1982). Section 1983 does not override a state's Eleventh Amendment immunity. *Quern v. Jordan,* 440 U.S. 332, 342 (1979). All the defendants are employees of the State of Connecticut. A suit against these defendants in their official capacities is ultimately a suit against the state itself because any monetary recovery would be expended on the public treasury. *Pennhurst State School and Hospital v. Halderman,* 465 U.S. 89, 101 n. 11 (1984). Thus, to the extent that the defendants are sued in their official capacities for monetary damages, this action is barred by the Eleventh Amendment. All claims for monetary damages against the defendants in their official capacities are DISMISSED.

II

Defendants O'Neill and Lieberman move to dismiss all remaining claims against them for failure to state a claim upon which relief can be granted. It has long been the law that officials are amenable to suit in their official capacities where injunctive and declaratory relief is the remedy sought. *See Ex parte Young,* 209 U.S. 123 (1908). While the defendant's personal involvement in the alleged deprivation is a prerequisite to maintaining a suit for damages under Sec. 1983, *see, e.g., McKinnon v. Patterson,* 568 F.2d 930, 934 (2d Cir. 1977), a supervisory official may be held responsible for the acts of his subordinates for the purposes of injunctive and declaratory relief. *Arthur v. Nyquist,* 573 F.2d 134 (2d Cir. 1978); *Project Release v. Prevost,* 463 F. Supp. 1033, 1037 (S.D.N.Y. 1978).

The plaintiff has not alleged any personal responsibility on the part of Defendants O'Neill and Lieberman within the meaning of 42 U.S.C. Sec. 1983. *See Williams v. Smith,* 781 F.2d

319, 323-24 (2d Cir. 1986) (outlining several ways in which a supervisory official may be personally involved). Any complaint which seeks monetary damages and does not contain some allegation that the defendant is chargeable with the personal responsibility for the alleged deprivation of a plaintiff's civil rights must be dismissed as insufficient. *McKinnon v. Patterson,* 568 F.2d at 934; *Johnson v. Glick,* 481 F.2d 1028, 1034 (2d Cir.), *cert. denied,* 414 U.S. 1033 (1973). Therefore, any claims against Defendants O'Neill and Lieberman in their individual capacities for monetary damages must be DISMISSED. However, the plaintiff has made sufficient claims for declaratory and injunctive relief against these two defendants in their official capacities to survive a motion to dismiss. *See Bogan v. New London Housing Authority,* 366 F.Supp. 861, 865 (D. Conn. 1973) (dismissal for failure to join state officers charged with enforcing statute). All claims which relate to these defendants in their official capacities and which seek declaratory or injunctive relief are NOT DISMISSED.

III

The defendants claim that the state no longer dismisses employees without pretermination hearings and that this fact renders all claims for prospective injunctive relief moot. This claim is without merit. "It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle Inc.,* 455 U.S. 283, 289 (1982). The defendants cannot render the plaintiff's claims moot by stating that they have stopped the alleged unlawful practice. The defendants' motion to dismiss all claims for prospective injunctive relief is DENIED.

IV

Connecticut General Statute Section 5-240 deals with the reprimand, suspension, demotion and dismissal of classified service state employees. It requires that a "permanent employee shall be given written notice of such dismissal at

least two weeks in advance of his dismissal. . . ." Conn. Gen. Stat. 5-240(c). While this statute is not comprehensive on its face, it is frivolous for the defendants to contend that the plaintiff cannot challenge the validity of this statute because it does not cover pretermination procedures. In cases concerning the termination of employees like the plaintiff, it appears to be the operative statutory provision. *See Coppola v. Personnel Appeal Board,* 174 Conn. 271, 274 (1978) (Where dismissal is in violation of the statute, an employee should be ordered reinstated.)

The defendants also maintain that the plaintiff has no standing to challenge the facial constitutionality of this statute. "The requirement of standing 'focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.' " *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 484 (1982) (quoting from *Flast v. Cohen,* 392 U.S. 83, 99 (1968)). Ostensibly, Section 5-240 applies to any permanent classified service employee who is dismissed from his job. A person to whom a statute applies and who is adversely affected by it can draw its constitutionality into question in a declaratory judgment action. *Alabama State Federation of Labor v. McAdory,* 325 U.S. 450, 463 (1945); *see Heckler v. Mathews,* 465 U.S. 728, 740-41 n. 9 (1984) (standing appropriate where plaintiff was personally denied benefits); *cf. United States v. Raines,* 362 U.S. 17, 21 (1960) (A party to whom a statute may constitutionally be applied lacks standing to challenge the statute on the ground that it would be unconstitutional as applied to others.)

The defendants also state that this court should abstain from judging the constitutionality of the statute. Abstension is proper where a state statute might be construed as giving the plaintiff procedural rights to which he claims he is entitled under the federal constitution. *See Boehning v. Indiana State Employees Association, Inc.* 423 U.S. 6 (1975) (statute provided for hearing). However, where there is no ambiguity in the statue, abstension is not required. *See Wisconsin v. Constantineau,* 400 U.S. 433, 438-39 (1971) (no provision for notice

and hearing). Furthermore, abstension is not required where a case involving a challenged state statute does not involve complex issues of state law, the resolution of which would be disruptive of state efforts to establish a coherent policy. *Zablocke v. Redhail*, 434 U.S. 374, 379-80 n. 5 (1978).

Pretermination procedures in cases involving federally protected property interests are governed by federal law. *Cleveland Board of Education v. Loudermill*, 105 S.Ct. 1487, 1491-93 (1985). The statute in question is relatively clear in defining the steps which the state must take in terminating one's employment. It does not provide for a pretermination hearing; it only covers notice requirements. The defendants have not presented this court with a convincing reason to now decide that it should abstain from considering the constitutionality of this statute. Accordingly, the defendant's motion to dismiss all claims challenging the facial constitutionality of Sec. 5-240 is DENIED.

V

Finally, Defendant Lopes moves to dismiss all claims against him in his individual capacity on the ground that he is entitled to qualified immunity. According to *Harlow v. Fitzgerald*, 434 U.S. 555, 561-66 (1978), "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Under the *Harlow* standard, defendants will be immune if, on an objective basis, their conduct was reasonable. *Malley v. Briggs*, 54 U.S.L.W. 4243, 4245 (March 5, 1986).

Defendant Lopes, as Commissioner of Corrections, is responsible for overall supervision and direction of all correctional institutions in Connecticut. Conn. Gen. Stat. Sec. 18-81. A supervisory official may be personally liable for monetary damages because he or she has created an unconstitutional policy or has allowed such a policy to continue. *McCann v.*

Coughlin, 698 F.2d 112, 125 (2d Cir. 1983); *Duchesne v. Sugarman*, 566 F.2d 817, 830-31 (2d Cir. 1977). The gravamen of Defendant Lopes' argument is that the law concerning pretermination or presuspension hearings was not made clear until the Supreme Courts decision in *Loudermill* on March 19, 1985. (See Defendant's Memorandum of Law, at 22). The plaintiff's employment was terminated in May, 1984. Accordingly, the plaintiff's right to a pretermination hearing was not a right "of which a reasonable person would have known." While this argument is an attractive one, it also provides an insufficient basis upon which to grant a motion to dismiss in the present case.

An essential principle of due process is that a deprivation of life, liberty, or property, must "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 313 (1950). The Supreme Court has established that a federal constitutional property right in continued employment exists under certain circumstances. *Board of Regents v. Roth*, 408 U.S. 564, 576-78 (1972). Connecticut General Statute Section 5-240(c) indicates that a "permanent employee" may be discharged "for misconduct, incompetency, or other reasons relating to the effective performance of his duties. . . ." The court will assume that this statutory language provides the plaintiff with a constitutionally protected interest.

Accordingly, "some kind of hearing" is required before an employee who has a constitutionally protected property interest in his employment is discharged. *Roth*, 408 U.S. at 569-70. This principle was not first enunciated by the *Loudermill* Court, but was simply reiterated as a principle established in past Supreme Court decisions. *Loudermill*, 105 S.Ct. at 1492-93. Thus, while Defendant Lopes could possibly claim he did not know what type of notice and hearing was required, it seems questionable that he can claim that he reasonably believed that no notice or hearing of any type was required. Although Defendant Lopes may eventually show that he is

entitled to qualified immunity, his motion to dismiss on this ground must now be DENIED.

Conclusion

(1) Defendants' Motion to Dismiss all claims against the Defendants in their official capacities for monetary damages is GRANTED.

(2) Defendants' Motion to Dismiss all claims against Defendants O'Neill and Lieberman in their individual capacities for monetary damages is GRANTED.

(3) Defendants' Motion to Dismiss on all other grounds raised in their motion is DENIED.

SO ORDERED.

Dated at Hartford, Connecticut, this 8th day of May, 1986.

/s/ Alan H. Nevas

ALAN H. NEVAS
UNITED STATES DISTRICT JUDGE

TEXT OF CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment of the Constitution provides in pertinent part:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The text of Conn. Gen. Stat. § 5-202 provides:

Sec. 5-202. Appeal by employee. (a) Any employee who is not included in any collective bargaining unit for state employees and who has achieved a permanent appointment as defined in subsection (r) of section 5-196 may appeal to the employees' review board if he or she is demoted, suspended or dismissed, or is aggrieved as a result of alleged discrimination, or unsafe or unhealthy working conditions or violations involving the interpretation and application of a specific state personnel statute or regulation. Such employee must have complied with preliminary review procedures. Such an appeal shall be submitted to the board within ten days of the completion of the final level of the preliminary review procedure, provided the first level of the procedure shall have been initiated no later than thirty calendar days from the date of the alleged violation, except that in cases of dismissal, demotion or suspension the grievance must be submitted directly to the third level of the procedure within twenty-one calendar days of the effective date of such action.

(b) Upon receiving an appeal, the board shall assign a time and place for a hearing and shall give notice thereof to the parties concerned. The hearing panel shall not be bound by

technical rules of evidence prevailing in the courts. If, after hearing, a majority of the hearing panel determines that the action appealed from was arbitrary or taken without reasonable cause, the appeal shall be sustained; otherwise, the appeal shall be denied. The hearing panel shall have the power to direct appropriate remedial action and shall do so after taking into consideration just and equitable relief to the employee and the best interests and effectiveness of the state service. The hearing panel shall render a decision within sixty calendar days from the date of the conclusion of the hearing.

(c) The employee in any such case shall be furnished, upon his request, with a copy of the transcript of the proceedings before the board. The chairman of the board shall establish a fair and reasonable fee per page to be charged for such transcript which fee shall not exceed the fee per page for a transcript charged by court reporters for the judicial district of Hartford-New Britain.

(d) Within ten days of the issuance date of a decision by a hearing panel sustaining an appeal, the appointing authority of the employee shall take such measures as are necessary to comply with the remedial action directed by the hearing panel.

(e) An employee laid off or dismissed by reason of economy, lack of work, insufficient appropriation, change in departmental organization or abolition of position may file an appeal with the board only on the grounds that the order of layoff or dismissal has not been determined in accordance with the provisions of section 5-241, provided such employee has initiated the third level of the preliminary review procedure within twenty-one calendar days of the effective date of such layoff or dismissal.

(f) All matters involving examination, including application rejection, type of examination or results, compensation for class or classes or duties, establishment of a new class or classes, compliance with health and safety standards and the Connecticut Occupational Safety and Health Act or

alleged discrimination in cases where an appeal as been filed with the human rights commission, shall not be appealable under this section.

(g) The first level of the preliminary review procedure preparatory to the filing of an appeal from an alleged grievable action other than dismissal, demotion or suspension shall be the aggrieved employee's supervisor or department chief or other employee as designated by the employee's appointing authority. Such aggrieved employee shall present his grievance in writing on a form developed by the commissioner of administrative services and the employee review board which form shall contain a statement of the date the alleged violation occurred and the relief sought in answer to the grievance. The first level designee shall give his answer to such employee within seven calendar days from the date the grievance is submitted to him or within seven days from the date of a meeting convened for the purpose of reviewing the grievance, in which case such meeting shall be convened within seven calendar days from the date the grievance is submitted.

(h) The second level of the preliminary review procedure preparatory to the filing of an appeal from an alleged grievable action other than dismissal, demotion or suspension shall be the aggrieved employee's appointing authority or designated representative. Such employee, upon receiving a response at the first level which he deems to be unsatisfactory, may proceed to this level by presenting the same form containing the first level answers within seven calendar days from the date the answer was given at the first level. The appointing authority or designated representative shall answer such employee within seven calendar days from the date the grievance is received or within seven calendar days from the date of a meeting convened for the purpose of reviewing such grievance, in which case such meeting shall be convened within seven calendar days from the date such grievance is received.

(i) The third level of the preliminary review procedure preparatory to the filing of an appeal from an alleged grievable

action including dismissal, demotion or suspension shall be the commissioner of administrative services or his designated representative. The employee, upon receiving a response at the second level which he deems to be unsatisfactory, may proceed to this level by presenting the same form containing the first and second level answers within seven calendar days from the date the answer was given at the second level, except in the case of a dismissal, demotion or suspension in which case such employee must present the form, completed but without answers at lower levels within twenty-one calendar days of the effective date of such action. The commissioner of administrative services or his designated representative shall reply to such employee within thirty calendar days from the date such grievance is received or within fifteen calendar days from the date of a meeting convened for the purpose of reviewing such grievance, in which case such meeting shall be convened within thirty calendar days from the date such grievance is received.

The text of Conn. Gen. Stat. § 5-240 provides:

Sec. 5-240. Reprimand, suspension, demotion, dismissal. (a) An appointing authority, subject to any regulations issued by the commissioner of administrative services, may reprimand an employee in the classified service under his jurisdiction or suspend such an employee without pay or with reduced pay for an aggregate period not exceeding sixty calendar days in any calendar year.

(b) An appointing authority, subject to any regulations issued by the commissioner of administrative services, may demote an employee in the classified service under his jurisdiction from a position in any given class or grade to a position in a lower class or grade. The appointing authority shall give the commissioner of administrative services written notice of his intention to effect any such demotion not less than two weeks before the date it is intended to become effective. The commissioner of administrative services may transfer such an employee whose record is otherwise satisfactory to

a position under the jurisdiction of another appointing authority, with the approval of such other appointing authority.

(c) An appointing authority may dismiss any employee in the classified service when he considers the good of the service will be served thereby. A permanent employee shall be given written notice of such dismissal at least two weeks in advance of his dismissal, except as hereinafter provided, and a copy of the same shall be filed with the commissioner of administrative services. Such notice shall set forth the reasons for dismissal in sufficient detail to indicate whether the employee was discharged for misconduct, incompetency or other reasons relating to the effective performance of his duties and shall be prepared in such form and given in such manner as the commissioner prescribes. The commissioner of administrative services may provide by regulation for the waiving of advance notice in cases of serious misconduct by an employee affecting the public, the welfare, health or safety of patients, inmates or state employees or the protection of state property. Such regulation shall provide for written notice to a permanent employee who has attained permanent status and shall not preclude whatever rights any employee may have to appeal. The name of any such employee dismissed for incompetency or other reasons relating to the effective performance of his duties shall be immediately removed from the eligible list in the office of the commissioner of administrative services.